IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10543 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

ADANI EXPORTS

Versus

DY COMMISSIONER OF INCOME TAX (ASSTTS)

Appearance:

MR SN SOPARKAR for Petitioner

MR PRANAV G. DESAI for MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

Date of decision: 29/12/98

ORAL JUDGEMENT (per R. Balia, J.)

Rule. Service of rule is waived by learned counsel for the respondent.

2. The petitioner challenges notice issued by the

respondent u/s 148 on 18.2.1997 in respect of A.Y. 1993-94. The reasons which are required to be recorded before issuing notice when demanded by the assessee were disclosed to the assessee by letter dated 16.4.97, Annexure F, which reads as under:-

"As per provision of section 147 of the I.T. Act, explanation 2(c)(iv), deduction u/s 80HHC claimed at Rs. 7,07,64,720/- has been wrongly claimed as you have not included an amount of 142.62 crores of export turnover in respect of marine division as total turnover of business, while claiming deduction u/s 80HHC of the I.T. Act which is not as per provision of the I.T. Act."

The petitioner challenges the issuance of notice, inter alia, on the grounds that the reasons show that impugned notices proceeds on mere change of opinion on reappreciation of evidence which is already on record. In respect of Marine Division the assessee has not claimed export benefit u/s 80HHC of the Act, the erroneous calculation of which is considered to be ground for reopening the completed assessment. The recourse to sec. 148 is not permissible to reopen concluded assessment merely because the authority takes a different view on the same facts which were already on record, and considered. Another contention which the petitioner raised is that the assessment has been reopened on the basis of remarks of Accountant General (Audit Wing). The remark of Accountant General cannot be regarded as information enabling the respondent to reopen the assessment in relation to the audit objection. It was further alleged that on receipt of a query from the Audit Wing of the Comptroller of Auditor General, the respondent called upon the petitioner to explain the stand of the petitioner from time to time. The matter rested there for some time and therefore the petitioner believed that audit objection has now been satisfied. It was further alleged that to the best of information of the petitioner at the time when the respondent issued impugned notice, he did not have any reason to believe that income has escaped assessment and was only acting at the instance of the Audit Wing of Comptroller & Auditor General which is another department altogether. As a matter of fact the belief of the assessing officer was that the income has not escaped assessment at all and to the petitioner's information on or around 15.3.1997 the respondent himself addressed a communication to the office of the Accountant General not accepting the correctness of the view of Audit Wing on the

interpretation of Sec. 80HHC. In other words, when the impugned notices were issued, after considering the same, the respondent did not hold any belief that the income of the assessee has escaped assessment for any reason.

3. In the first instance, reply to the petition in the form of affidavit of one Mr. M.K. Dubey, who is not the assessing officer who has issued impugned notices and the existence of whose belief is under challenge, was filed and nothing except urging that reopening can take place in pursuance of remarks by he Accountant General Audit Wing in view of change in sec. 147 was stated. When the petitoiner was permitted to amend the petition in furtherance of his original assertion in the petition that before issuance of notice the assessee was called upon to explain the query and assessee was given to believe that audit objections have been satisfied, and that the assessing officer even after issuance of notice believed that there was no error in the original assessment order to believe, that income has escaped assessment, it raised a question mark about the very existence of belief in the mind of the respondent, about escapement of income from tax.

4. Thereafter another affidavit of Mr. M.H. Pandav of the concerned, officer who has recorded reasons for issuing notice u/s 148 was filed. The record of the case was also produced before the court for perusal. In the affidavit to amended petition as well as in earlier affidavit, it was admitted that the facts narrated by the petitioner insofar as they form part of the record are admitted. It was asserted in the affidavit by the respondent that, "my correspondence with the audit wing was for my seeking absolute clarity on the vexed issue and is not directly relevant to the mater and in any case does not detract from the fact that I had the necessary reason to believe that income had escaped assessment at the time of issuance of the notice." In affidavit of Mr. M.H. Pandav, while it was admitted that there was correspondence between his office and office of the Audit Wing and in the earlier correspondence he had put forward a possible point of view before the Audit Wing of the department for clarity and asserted that at the time of issuing the notice he had arrived at the necessary independent satisfaction on receiving information about non-disclosure of turnover from the audit department, he has kept silence about averments made in the petition about again sticking to his earlier view about non-maintainability of audit objection vide a letter on or about 19.3.1997.

5. Absence of any denial about the later correspondence still asserting the correctness of earlier assessment prompted us to go through the record of the proceedings for initiation of action u/s 148. It revealed that, in the first instance, the concerned officer in his letter dated 4.3.96 in the report to CIT, Gujarat-3, in his 4-page note, after discussing at length the issue, expressed his view as under:-

"In view of above, the petition raised in respect of deduction under sec. 80 HHC requires to be dropped, since there is no mistake in allowing deduction under sec. 80HHC.

If the above position is not acceptable, then the remedial action under sec. 147 or under sec. 263 can betaken for which time-limit will be expiring on 31st March 1997."

This letter reveals at least that as of 4.3.96 the said officer did not hold any belief that income has escaped assessment because of erroneous computation u/s 80 HHC and it was left for the higher officers to conclude and decide if they still did not agree with the view taken by the assessing officer, then, in that event, remedial measures u/s 147 by way of initiating reassessment proceedings or u/s 263 by exercise of power by the Commissioner for setting aside the assessment year treating it to be erroneous and prejudicial to the interest of revenue can be resorted to, that is to say, the remedial measures depended upon the satisfaction of superior officers but not on the belief of assessing officer. In pursuance of this the audit department sought instructions whether to drop the proceedings or settle it otherwise.

6. On 12.6.1996 the assessing officer was informed by Commissioner of Income-tax about the remedial actions which are required to be taken by him under Board's Instruction No. 828 dt. 24.2.1975 and he was requested to send his report on the audit objection along with case records. He was also directed to suggest the most appropriate remedial action as required under aforesaid instructions of the Board. In response to this letter, the assessing officer informed the Commissioner that report dated 4.3.96 has already been sent again suggesting that remedial action u/s 147 or u/s 263 for which time-limit expires on 31.3.97 if revenue audit objection is not to be dropped. This letter dated 28.6.96 again reveals the state of mind of the assessing officer's suggestion to take remedial action depending on

dropping or sustaining audit objection by his superiors but not on his own. Thereafter, on 18.2.97, notices have been issued. The proceedings before issuance of notice goes to show that first a note has been submitted about there being approval of the action by CIT as intimated by the Deputy Commissioner of Income-tax (Audit) vide his letter dt. 29.8.96 and notice u/s 148 issued on 18.2.97. The note was put up for signature and thereafter the aforesaid reasons have been recorded. On 18.2.97 this happens and on 17.3.97 the very officer writes to the Commissioner of Income-tax which is supposed to be in continuation of earlier report dated 4.3.96 along with copy of his report. It is a longish document of about 8 pages. The final conclusion recorded by the concerned officer in the last para of the report reads:-

> "Considering the aforesaid analysis and effect of circular and considering the fact that divisions are separate and independent and there is no interlacing of finance and management and further taking into consideration the law pronounced by Supreme Court in 161 ITR 320 Canara Work Shop, the claim put in by the assessee company and already assessed should be accepted."

7. Thus, from the record it is apparent that right from the date the respondent assessing officer was apprised of the adit objection, at no point of time up to 18.3.97, has betrayed any suggestion of holding any doubt about correctness of his earlier decision in the assessment proceedings about computation of benefit u/s 80HHC in the case of the assessee. In spite of holding the view, he has been suggesting to the superior officers that if his view is not acceptable, recourse may be had to sec. 147 or sec. 263 that is to say depending upon the view taken by the superior authority.

8. The position of information contained in audit report vis-a-vis formation of belief by the assessing officer, existence of which is a condition precedent for initiating proceedings u/s 147, even after amendment has been succinctly stated by Their Lordships in Indian and Eastern Newspaper Society v. CIT, New Delhi, (1979) 119 ITR 996.

> "Although an audit party does not possess the power to pronounce on the law, it nevertheless may draw the attention of the ITO to it. Law is one thing, and its communication another. If the distinction between the source of the law and the communication of the law is carefully maintained,

> the confusion which often results in applying sec. 147(b) maybe avoided. While the law may be enacted or laid down only by a person or body with authority in that behalf, the knowledge or awareness of the law maybe communicated by anyone. No authority is required for the purpose. That part alone of the note of an audit party which mentions the law which escaped the notice of the ITO constitutes "information" within the meaning of sec. 147(b); the part which embodies the opinion of the audit party in regard to the application or interpretation of the law cannot be taken into account by the ITO."

More importantly, the court said,

> "in every case, the ITO must determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has now come to his notice he can reasonably believe that income has escaped assessment. The basis of his belief must be the law of which he has now become aware. The opinion rendered by the audit party in regard to the law cannot, for he purpose of such belief, add to or colour the significance of such law. The true evaluation of the law in its bearing on the assessment must be made directly and solely by the ITO".

9. The ratio fully governs the present case and the record illuminates the failure of the assessing officer to adhere to this principle while issuing notice u/s 148 in the present case.

10. It is true that satisfaction of the assessing officer for the purpose of reopening is subjective in character and the scope of judicial review is limited. When the reasons recorded show a nexus between the formation of belief and the escapement of income, a further enquiry about the adequacy or sufficiency of the material to reach such belief is not open to be scrutinised. However, it is always open to question existence of such belief on the ground that what has been stated is not correct state of affairs existing on record. Undoubtedly, in the face of record, burden lies, and heavily lies, on the petitioner who challenges it. If the petitioner is able to demonstrate that in fact the assessing officer did not have any reason to believe or did not hold such belief in good faith or the belief

which is projected in papers is not belief held by him in fact, the exercise of authority conferred on such person would be ultra vires the provisions of law and would be abuse of such authority. As the aforesaid decision of the Supreme Court indicates that though audit objection may serve as information, the basis of which the ITO can act, ultimate action must depend directly and solely on the formation of belief by the ITO on his own where such information passed on to him by the audit that income has escaped assessment. In the present case, by scrupulously analysing the audit objection in great detail, the assessing officer has demonstrably shown to have held the belief prior to the issuance of notice as well as after the issuance of notice that the original assessment was not erroneous and so far as he was concerned, he did not believe at any time that income has escaped assessment on account of erroneous computation of benefit u/s 80HHC. He has been consistent in his submission of his report to the superior officers. The mere fact that as a subordinate officer he added the suggestion that if his view is not accepted, remedial actions may be taken cannot be said to be belief held by him. He has no authority to surrender or abdicate his function to his superiors, nor the superiors can arrogate to themselves such authority. It needs hardly to be stated that in such circumstances conclusion is irresistible that the belief that income has escaped assessment was not held at all by the officer having jurisdiction to issue notice and recording under the office note on 8.2.97 that he has reason to believe is a mere pretence to give validity to the exercise of power. In other words, it was a colourable exercise of jurisdiction by the assessing officer by recording reasons for holding a belief which in fact demonstrably he did not held that income of assessee has escaped assessment due to erroneous computation of deduction u/s 80HHC, for the reasons stated by the audit. The reason is not far to seek.

11. Notwithstanding this clear position of law emerging from the decision of the Supreme Court, the instructions of the Board still persisted that as soon as audit objections are raised, prompt remedial acton in the nature of revenue should be taken even if objection is not accepted by the ITO. The instructions are being taken for remedial action viz. remedial action should ivariably be initiated as a precautionary measure in respect of audit objections, even if the objection is not accepted by the ITO or without assessing authority applying his mind to such information for reaching ohis own conclusion. Once the remedial action is initiated, it can be dropped with the approval of the CIT if the

objection raised is one of facts and the facts stated to the audit are found to be incorrect.

12. Thus, contrary to decision of the Supreme Court, instructions of the Board directs that merely on raising of audit objection for remedial action by initiating proceedings of reassessment be taken, notwithstanding that the authority vested with power to exercise jurisdiction for issuing notice is not satisfied about existence of such circumstances which may warrant exercise of such power. To say the least, such ultra vires instructions cannot be pressed into service to save the initiator of proceedings u/s 147, in the absence of holding of any belief by the assessing officer, by arrogating the power to itself by the Board by issuing such directions contrary to the provisions of law at the pains of subjecting the officer to pains of exposing him to charge of insubordinaton.

13. As in the present case, we are satisfied, on the basis of record made available to us, in the light of averments made in the petition, that the respondent did not hold belief at any point of time that income of the assessee has escaped assessment on account of erroneous computation of benefit u/s 80HHC, it cannot but be held that the reasons recorded on file are mere pretence. The action, therefore, must fail.

14. Accordingly, this petition succeeds. The impugned notice dated 18.2.1997 is quashed. Rule is made absolute. There shall be no order as to costs.

(hn) ------